Supreme Court, U.S.
FILED

No. 03 559 OCT 13 2003

In The
Supreme Court of the United States

SERGIO RENDON, JOANN M. NORRIS, JAMES J. SILCOCK, PAUL J. LUSSIER, STEPHEN R. FISHER, and LOIS V. BUSICK, individually and on behalf of all others similarly situated,

Petitioners,

vs.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES; FRED O. DICKINSON, III, in his official capacity as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; FLORIDA DEPARTMENT OF TRANSPORTATION; and BEN G. WATTS, in his official capacity as Secretary of the Florida Department of Transportation,

Respondents.

On Petition For Writ Of Certiorari To The Third District Court Of Appeal For The State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress has authority to abrogate the Eleventh Amendment immunity of the States for claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 et seq.?

2. Whether the Tenth Amendment to the United States Constitution prohibits the prospective enforcement of Title II of the Americans with Disabilities Act by entry of declaratory and injunctive relief against the responsible state officers in accord with *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908)?

LIST OF PARTIES

The parties to the proceedings for which review is sought are those appearing on the caption of this case. In addition, the named Plaintiffs are representatives of a certified class defined as:

> All persons or organizations who have purchased permits for persons with nontemporary disabilities allowing use of accessible parking, since January 26, 1992, and all persons with nontemporary disabilities who will in the future be required to pay money for such permits until and unless declaratory and injunctive relief restrains the future collection of such fees.

Order Granting Plaintiffs' Motion for Class Certification and Denying Defendants' Motion to Dismiss at 7. A copy of this Order is in the Appendix.

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OPINIONS BELOW

The opinion of the Third District Court of Appeal is published at 832 So.2d 141 (Fla. 3d DCA 2003), and is in the Appendix. Also in the Appendix is the Circuit Court's Order Granting Plaintiffs' Motion for Class Certification and Denying Defendants' Motion to Dismiss, the Circuit Court's Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, the District Court of Appeal's order denying Plaintiffs' motion for clarification, reconsideration and certification, and the Florida Supreme Court's order declining jurisdiction.

STATEMENT OF JURISDICTION

The decision of the Third District Court of Appeal was filed on October 30, 2002. That Court denied reconsideration on December 11, 2002. The Florida Supreme Court declined to accept jurisdiction to review the Third District's decision on July 15, 2003. The United States Supreme Court has jurisdiction to review the decision of the Third District Court of Appeal pursuant to 28 U.S.C. § 1257, as that decision: (1) draws into question the validity of the abrogation of Eleventh Amendment immunity as provided in 42 U.S.C. § 12202 for claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 et seq. ("Title II"); and (2) holds Plaintiffs' claimed right under Title II to be wholly unenforceable as a result of the Tenth and Eleventh Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The questions presented involve the Tenth, Eleventh and Fourteenth Amendments to the United States Constitution; the prohibition against disability discrimination in Title II of the Americans with Disabilities Act ("Title II") at 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(f); and Title II's express abrogation of Eleventh Amendment immunity, at 42 U.S.C. § 12202. These are each reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioners/Plaintiffs, Sergio Rendon, Joann M. Norris, James J. Silcock, Paul J. Lussier, Stephen R. Fisher, and Lois V. Busick, individually and on behalf of all others similarly situated ("Plaintiffs"), filed suit in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, challenging the requirement under Florida law that a fee be paid for placards allowing use of accessible parking. Plaintiffs alleged that the placard fee is a facially discriminatory fee on access, and violates 42 U.S.C. § 12132.

The State Circuit Court agreed that the placard fee violates Title II.[1] In so doing, the Court rejected the argument

[1] Accord *Dare v. California*, 191 F.3d 1167, 1171-73 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190, 121 S.Ct. 1187, 149 L.Ed.2d 103 (2001); *Thompson v. Colorado*, 29 F.Supp.2d 1226 (D. Colo. 1998), *vacated for lack of federal jurisdiction*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077, 122 S.Ct. 1960, 152 L.Ed.2d 1021 (2002); *Duprey v. Connecticut*, 28 F.Supp.2d 702 (D. Conn. 1998); *Thrope v. Ohio*, 19

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that the Eleventh Amendment immunizes the State of Florida and its agencies from suit in state court to enforce Title II, and rejected the argument that the prohibition of fees on access violates the Tenth Amendment.

Defendants appealed this ruling to the District Court of Appeal for the Third District of Florida, which reversed and remanded with instructions to grant summary judgment in favor of Defendants. As its published decision explains, the Third District Court of Appeal concluded that Title II is not within Congress' power to enforce the Fourteenth Amendment, and so Congress lacked authority to abrogate Eleventh Amendment immunity. 832 So.2d at 144-47. The Court further held that Title II's prohibition of fees on access could not even be enforced against the appropriate state officers, because even if the prohibition of fees on access is within Congressional power to regulate interstate commerce, "it would raise grave constitutional concerns concerning the scope of that power when used exclusively to regulate state governments acting in their governmental capacity." 832 So.2d at 146 n.5.

Plaintiffs timely moved to clarify, reconsider, or certify the Third District's decision. This motion was denied on December 11, 2002. On January 3, 2003, Plaintiffs invoked

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F.Supp.2d 816 (S.D. Ohio 1998); *McGarry v. Director, Dep't of Revenue*, 7 F.Supp.2d 1022 (W.D. Mo. 1998), *vacated for lack of federal jurisdiction*, 1999 U.S. Dist. LEXIS 22222 (W.D. Mo. 1999), *reversed*, 281 F.3d 776 (8th Cir. 2002). See generally Joseph Groshong, *Curbing State Discrimination Against Disabled Drivers: Why the Disabled Need Not Pay the States to Participate in Disabled Parking Programs*, 33 Seton Hall L. Rev. 811 (2003).

the discriminatory jurisdiction of the Supreme Court of Florida, which declined jurisdiction on July 15, 2003.

This petition timely follows.

ARGUMENTS FOR GRANTING CERTIORARI

The ruling that Title II is not within Congress' authority under Section 5 of the Fourteenth Amendment merits review because: (1) the Circuits are conflicted over whether Title II is a legitimate exercise of Congressional power under Section 5; (2) it raises a question of exceptional importance; and (3) this Court has previously attempted to resolve this issue, and presently has the issue on its docket. The ruling that enforcement of Title II's prohibition of fees on access would violate the Tenth Amendment merits review because it: (1) conflicts with authorities indicating that there is no Tenth Amendment bar to enforcement of Title II; and (2) raises a question of exceptional importance.

I. Courts Are In Conflict

The ability to enforce rights under Title II varies considerably depending on the area of the United States in which a person with disabilities lives. Such rights are enforceable without Eleventh Amendment interference in the Ninth Circuit. See *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003); *Hason v. Medical Bd.*, 279 F.3d 1167, 1170-71 (9th Cir. 2002), *cert. dismissed*, 123 S.Ct. 1779, 155 L.Ed.2d 508 (2003); *Dare*, 191 F.3d at 1171-73. Other Circuits allow enforcement of Title II claims under certain circumstances. For example, in the Second Circuit Title II

rights may be enforced through a direct action against a state defendant where the plaintiff alleges irrational discriminatory animus or ill will. *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001). The Sixth Circuit also upholds Congress' abrogation of state immunities from suit where the Title II claim at issue sounds in due process. See *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 123 S.Ct. 2622, 156 L.Ed.2d 626 (2003); *Carten v. Kent State University*, 282 F.3d 391 (6th Cir. 2002); *Popovich v. Cuyahoga County Court*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 812, 123 S.Ct. 72, 154 L.Ed.2d 15 (2002). A panel of the First Circuit held that state immunity was abrogated for a Title II claim based upon potentially unconstitutional conduct of a state prisoner suffering from amyotrophic lateral sclerosis, but this decision was vacated for reconsideration en banc, which found the First Circuit to be evenly divided on the question. *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13 (1st Cir. 2002), *vacated for rehearing en banc*, 310 F.3d 785 (1st Cir. 2002), *district court aff'd by equally divided en banc court*, 332 F.3d 29 (2003). See also *Amos v. Maryland Dep't of Public Safety*, 178 F.3d 212, 221 (4th Cir. 1999), *vacated for rehearing en banc* (4th Cir. 1999), *dismissed*, 205 F.3d 687 (4th Cir. 2000); *Brown v. North Carolina DMV*, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 531 U.S. 1190, 121 S.Ct. 1187, 149 L.Ed.2d 103 (2001).

In contrast, no action to enforce Title II may be brought against a state defendant in federal court in the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits. See *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Thompson v. Colorado*, 278 F.3d at 1027-34; *Walker v.*

Snyder, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190, 121 S.Ct. 1188, 149 L.Ed.2d 104 (2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1006-10 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001, 120 S.Ct. 1265, 146 L.Ed.2d 215 (2000). This is the view of the Third District Court of Appeal in the ruling below, and was recently the conclusion of an Illinois state appellate court. See *Evans v. Page*, 792 N.E.2d 805, 275 Ill. Dec. 330 (Ill. Ct. App. 2003).

With respect to issue two, the District Court of Appeal's ruling that no prohibition against fees on access may be enforced even prospectively due to Tenth Amendment restrictions on the federal power is contrary to *Dare*, 191 F.3d at 1176; *Thompson*, 29 F.Supp.2d at 1238; and *McGarry*, 7 F.Supp.2d at 1026. While *Dare*, *Thompson*, and *McGarry* each involve discriminatory fees on access, other courts have uniformly rejected Tenth Amendment objections to Title II claims. See *Hicks v. Armstrong*, 116 F.Supp.2d 287, 293-94 (D. Conn. 1999); *Bailey v. Anderson*, 79 F.Supp.2d 1254, 1259 (D. Kan. 1999); *Doe v. Judicial Nominating Comm'n*, 906 F.Supp. 1534, 1539 (S.D. Fla. 1995); *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F.Supp. 1489, 1494-95 (S.D. Fla. 1994). The ruling is also contrary to authorities holding that Congress' power to regulate interstate commerce includes the power to prohibit state financial burdens on commerce, notwithstanding any Tenth Amendment objection by the states. See *Deer Park Indep. Sch. Dist. v. Harris County Appraisal*, 132 F.3d 1095, 1099 (5th Cir. 1998), *cert. denied*, 524 U.S. 938, 118 S.Ct. 2343, 141 L.Ed.2d 714 (1998) ("historically, Congressional prohibitions on state taxation have been upheld over Tenth Amendment challenges"); *Arizona v. Atchison, T. & S.F.R. Co.*, 656 F.2d 398, 407-09 (9th Cir. 1981).

Finally, the refusal to allow Title II to be enforced prospectively by declaratory and injunctive relief against the responsible state officials is contrary to every Circuit decision on this point. See *Henrietta D. v. Bloomberg*, 331 F.3d 261, 288-89 (2nd Cir. 2003); *Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003); *Carten v. Kent State University*, 282 F.3d 391, 395-97 (6th Cir. 2002); *Grey v. Wilburn*, 270 F.3d 607, 609 (8th Cir. 2001); *Gibson v. Arkansas Dep't of Correction*, 265 F.3d 718 (8th Cir. 2001); *Randolph v. Rodgers*, 253 F.3d 342 (8th Cir. 2001); *J.B. v. Valdez*, 186 F.3d 1280, 1286-87 (10th Cir. 1999); *Nelson v. Miller*, 170 F.3d 641, 646-47 (6th Cir. 1999). Rulings on this point include a decision that fees on placards may be prohibited by declaratory and injunctive relief. See *Klingler v. Director, Dep't of Revenue*, 281 F.3d 776 (8th Cir. 2002). The only appellate authority to the contrary, *Walker v. Snyder*, 214 F.3d 344, 346-47 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190, 121 S.Ct. 1188, 149 L.Ed.2d 104 (2001), was disapproved in *Bruggeman*.

Given this balkanization with respect to the enforceability of rights under Title II, there is a need to resolve the conflict among the Circuits concerning this issue. Otherwise, the enforceability of rights under Title II will continue to vary depending upon the federal circuit in which the party resides, and whether the issue is determined by state or federal court. Indeed, the ruling of the Third District Court of Appeal demonstrates that the uncertainty in the federal courts is now causing uncertainty in the state courts.

II. Issue Is Of Exceptional Importance

The enforceability of rights under Title II, the asserted immunities of the States from the enforcement of such rights, and Congress' power to enforce the Fourteenth Amendment, are matters of unquestionable importance. This importance is reflected in part by the substantial attention given by the Court to disability rights issues in the last several terms, see, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); as well as the Court's regular consideration of state immunity issues, and of issues concerning Congress' power to abrogate state immunities, see, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

Congress' findings also demonstrate the importance of the issue. Congress found that as of 1990, the number of Americans with one or more disabilities was 43,000,000, and growing. Disability discrimination continues to be a serious and pervasive social problem, which persists in such areas as public accommodations, education, transportation, recreation, institutionalization, health services, voting, and access to public services. As a result, people with disabilities have been relegated to an inferior status, severely disadvantaged socially, vocationally, economically, and educationally. See 42 U.S.C. § 12101.

III. Supreme Court Has Repeatedly Tried To Reach Title II Abrogation Question, And Issue Is Now Before The Court

This Court has previously determined that the question of Congress' power to abrogate state immunity from suits to enforce Title II is worthy of certiorari review.

Earlier efforts to resolve this issue on petitions granted in *Alsbrook* and *Kimel v. Florida Bd. of Regents*, 139 F.2d 1426 (11th Cir. 1998), *cert. dismissed*, 528 U.S. 1184, 120 S.Ct. 1236, 145 L.Ed.2d 1131 (2000), failed when those cases settled. Certiorari was granted to resolve this issue in *Garrett*, but the Court ultimately determined that the issue was not properly presented. *Garrett*, 121 S.Ct. at 960 n.1. More recently, certiorari was granted to resolve this issue in *Hason*, but on request of the State of California the petition was dismissed.

The issue is now before this Court on review of the Sixth Circuit's decision in *Lane v. Tennessee*. The fact that this Court has granted certiorari to decide the constitutionality of Congress' abrogation of immunities for Title II claims on prior occasions, coupled with the continuing conflict among the Circuits since issuance of the decision in *Garrett*, demonstrates that the question presented by this petition is worthy of review.

At the least, Plaintiffs ask the Court to hold this petition until such time as a ruling is made in *Lane v. Tennessee*. Upon such ruling, Plaintiffs ask that the decision of the Third District Court of Appeal be vacated and this case remanded for further consideration in light of whatever should be determined by this Court in *Lane v. Tennessee*.

CONCLUSION

Based on the foregoing, Plaintiffs ask that this Court grant this petition for writ of certiorari as to the questions presented. In the alternative, Plaintiffs ask this Court to hold this petition until a decision is rendered in *Lane v.*

Tennessee, and thereupon vacate the decision below and remand for reconsideration in light of the decision in *Lane v. Tennessee*.

October 13, 2003

Respectfully submitted,

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2002

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY, etc., et al.,	**	
Appellants,	**	CASE NO. 3D02-611
vs.	**	LOWER TRIBUNAL NO. 96-17716
SERGIO RENDON, et al.,	**	
Appellees.	**	

Opinion filed October 30, 2002.

An appeal from the Circuit Court for Dade County, Amy Steele Donner, Judge.

Robert A. Butterworth, Attorney General, and Louis F. Hubener and Eric J. Taylor, Assistant Attorneys General, for appellants.

Karen A. Gievers; Peterson & Myers and J. Davis Connor and Stephen R. Senn; Antonello & Fegers; Michael F. Lanham, for appellees.

Before JORGENSON, LEVY, and GODERICH, JJ.

JORGENSON, Judge.

In an action challenging the imposition and collection of fees for placards for handicapped parking spaces, the State of Florida, Department of Highway Safety and Motor Vehicles [DOT] appeals from orders granting class certification and granting plaintiff's motion for summary judgment. For the following reasons, we reverse.

Various handicapped drivers sued DOT in a class action for declaratory and injunctive relief and to recover fees paid for parking placards that allow them to park in spaces reserved for the handicapped. The complaint alleged that the imposition of the fee violated Title II of the Americans with Disabilities Act [ADA], specifically 42 U.S.C. § 12132, and 28 C.F.R. § 35.130(f), a Department of Justice regulation implementing Title II. The regulation provides that

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Until 2002, the State charged a $15.00 fee for the handicapped parking placards. *See* Fla. Stat. § 320.0848(2)(c) (2001). As of 2002, that fee has been replaced by an administrative processing charge of $1.50. Ch.2002-20, § 121 at p. 577, Laws of Fla.

History of the Litigation

Plaintiffs first filed their actions in federal court; those actions were dismissed on the grounds that the Federal Tax Injunction Act, 28 U.S.C. § 1341, "divests the federal courts of subject matter jurisdiction over claims challenging state taxation procedures where the state courts provide a 'plain, speedy and efficient remedy.'" *Lussier v. State of Florida, Dep't of Highway Safety & Motor Vehicles,* 972 F. Supp. 1412, 1417 (M.D. Fla. 1997); *see also Rendon v. State of Florida, Dep't of Highway Safety & Motor Vehicles,* 930 F. Supp. 601 (S.D. Fla. 1996). Both district courts held that Florida's surcharge for handicapped parking placards constituted a tax, and that plaintiffs' remedies were in state court, pursuant to section 320.0848, Florida Statutes. "Insofar as the state court has jurisdiction over ADA cases, 42 U.S.C. § 12202, the Court finds that Plaintiffs may raise all challenges to the surcharge under Fla. Stat. Ann. § 320.0848, including claims that the surcharge violates the ADA, in the state court." *Rendon,* 930 F. Supp. at 605. Having ruled that they lacked subject matter jurisdiction, the courts did not reach the merits of the actions.

In 1996, plaintiffs filed a class action complaint against DOT in state court, seeking declaratory and injunctive relief and damages consisting of repayment of the allegedly unlawful parking placard tax. The trial court granted class certification; denied defendants' motion to dismiss; denied DOT's motion for summary judgment; and granted the plaintiffs' motion for summary judgment. The trial court ruled, *inter alia,*

1) that plaintiffs did not have to first exhaust administrative remedies before challenging the tax as a violation of the ADA;

2) that the action was not time-barred by the three-year claim period specified in section 215.26(2), Florida Statutes; and

3) that sovereign immunity had been waived under Title II of the ADA.

The court declared that "Florida's statutory scheme of requiring the payment of a fee for a disabled parking permit under Fla. Stat. § 320.0848 violates Title II of the Americans with Disabilities Act." The court enjoined the State from requiring the payment of any fee for a handicapped parking permit from future permit applicants, and ordered the State to reimburse plaintiffs for parking permit fees collected since January 26, 1992, plus interest.

We reverse, as,

1. Sovereign immunity affords the DOT an absolute defense to claims for declaratory relief and money damages; and

2. 28 C.F.R. § 35.130(f) is an invalid exercise of the Department of Justice's rulemaking authority, and the plaintiffs are not entitled to prospective injunctive relief.

The complex issue of a state's sovereign immunity from suit under federal law invokes bedrock concepts of federal constitutional law regarding the sovereign rights of states, and begins with the Eleventh Amendment to the United States Constitution, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Amendment has been read to establish first "that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996) (citations omitted). The Eleventh Amendment therefore imposes limits on congressional power to strip states of immunity in federal court; Congress may do so only if the Act in question is passed pursuant to section five of the Fourteenth Amendment. *Id.* at 59; *see also Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356 (2001).

In *Garrett,* the Court held that "[s]ection 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 [of the Fourteenth Amendment [1]] by enacting 'appropriate legislation'." *Id.* at 365 (citations omitted). However, "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted

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[1] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. IV, § 1.

to that end.'" *Id.* The constitutional precepts that limit congressional power to strip states of their sovereign immunity in federal court also limit congressional power to strip states of sovereign immunity in their own state courts. *See Alden v. Maine,* 527 U.S. 706 (1999). The same Fourteenth Amendment analysis applies; that analysis "does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State but from the national power." *Id.* at 732.

Applying those precepts to the ADA, the Supreme Court held that Title I of the ADA[2], which imposes affirmative obligations on employers, is not valid enforcement legislation and thus does not abrogate the sovereign immunity of the states. *See Garrett,* 531 U.S. at 356. In *Garrett,* the Court held that employees of the State of Alabama could not recover money damages by reason of the State's failure to comply with the provisions of Title I of the ADA, as such suits are barred by the Eleventh Amendment.

Congress can abrogate nonconsenting states' Eleventh Amendment immunity from suit "when it does so pursuant to a valid exercise of its § 5 power." *Id.* at 364. It is the Court's responsibility "to define the substance of constitutional guarantees," *Id.* It is therefore the Supreme Court

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[2] Title I of the ADA provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

that must determine whether congressional legislation meets the requirements of congruence and proportionality.

In *Garrett,* the Court examined the legislative history of the ADA and determined that Congress had failed to identify a history and pattern of irrational state discrimination in employment against the disabled. *Id.* at 368-369. Even if such a pattern were discernible, the remedies that Congress imposed were not congruent or proportional to the targeted violation. *Id.* at 374. In sum, the Court held that Congress did not validly abrogate the State's sovereign immunity from suit by private individuals for money damages under Title I. The Court explicitly did not reach the question of whether claims under Title II of the ADA were likewise barred. *Id.* at 360, n.1.

Following *Garrett,* various courts of appeal have held that sovereign immunity also bars actions against states under Title II, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *See Wessel v. Glendening,* 2002 WL 31121398 (4th Cir. Sept. 26, 2002); *Reickenbacker v. Foster,* 274 F. 3d 974 (5th Cir. 2001); *Robinson v. Univ. of Akron Sch. of Law,* 2002 WL 31235029 (6th Cir. October 7, 2002). *Contra, Hason v. Medical Bd. of Cal.,* 279 F.3d 1167 (9th Cir. 2002).[3]

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[3] "Stubbornly extending enforcement of Title II of the Americans with Disabilities Act ("ADA") against the Nine Western States, today's opinion blithely ignores recent Supreme Court precedent and follows

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The Eleventh Circuit has not ruled on the issue; however, in *Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ.*, 178 F. Supp. 2d 1291 (S.D. Fla. 2001), the District Court for the Southern District of Florida held that the analytical framework of *Garrett* also bars suits by individuals against states under Title II. *Id.* at 1294-1295. The court further held that "the Eleventh Amendment bars suit against an unconsenting state for injunctive relief as well as for money damages." *Id.* at 1295. Pursuant to *Alden v. Maine*, 527 U.S. at 706, sovereign immunity bars a citizen's suit here in state court to enforce Title II of the ADA and recover money damages for the state's alleged failure to comply with that act.

For the same reasons that Title II of the ADA does not abrogate Florida's sovereign immunity from suit, we hold that the Department of Justice exceeded its rulemaking authority in enacting 28 C.F.R. § 35.130(f), which bars the imposition of any surcharge for accessibility programs and measures. *See Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001).

In *Brown*, the Fourth Circuit affirmed the district court's dismissal of a class action brought by five purchasers of North Carolina handicapped parking placards who had sued to recover a fee charged by the state for the placard. Their claim was the same as the one plaintiffs raised in this case: the fee was alleged to violate 28 C.F.R.

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superseded cases of our court instead. It bears repeating: This decision cannot possibly be right." *Hason v. Medical Bd. of Cal.*, 294 F.3d 1166, 1167 (O'scannlain, Judge, dissenting from the denial of the petition for rehearing en banc).

§ 35.130(f), promulgated under the ADA. In *Brown,* the Fourth Circuit applied the sovereign immunity analysis used in *Seminole Tribe,* and later in *Garrett*,[4] and held that "28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 [of the Fourteenth Amendment] power." The court held that the regulation banning all surcharges "redefine[d] the Equal Protection Clause, transforming it from a prohibition on invidious state action into a charter of positive rights. Such a step, however, is beyond the scope of the Fourteenth Amendment." *Brown,* 166 F.3d at 707. We adopt the holding and rationale of *Brown.*

Plaintiffs also sued state DOT officers in their individual capacities, and argue that sovereign immunity does not bar prospective injunctive relief. *See Ex Parte Young,* 209 U.S. 123 (1908). Although that general statement is true, because the regulation is invalid, prospective relief does not lie.[5]

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[4] It is interesting to note that the Supreme Court did not deny certiorari in *Brown* until after it had decided *Garrett.*

[5] Assuming that the regulation in question was somehow enacted pursuant to an exercise of congressional power to regulate interstate commerce, it would raise grave constitutional concerns concerning the scope of that power when used exclusively to regulate state governments acting in their governmental capacity. *See Printz v. United States,* 521 U.S. 898 (1997); *New York v. United States,* 505 U.S. 144 (1992). Courts should not defer to an agency construction of a statute that would create serious constitutional questions absent a clear statement of constitutional intent. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers,* 531 So. 2d 159 (2001). Title II contains no clear statement of intent to strip states of their traditional authority to charge fees for state services. Rather than attempt to

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In conclusion, we hold that because Title II of the ADA did not abrogate Florida's sovereign immunity from citizens' suits, and because 28 C.F.R. § 35.130(f) itself is invalid, the State could lawfully impose and collect a fee for handicapped placards. Plaintiffs are therefore not entitled to an award of damages consisting of placard fees already collected or the equitable relief sought.

We recognize that this result may seem harsh, as the ADA was designed as remedial legislation to address the prejudice and obstacles that people with impairments confront on a daily basis.

> One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. The law works this way because the law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.

Garrett, 531 U.S. at 375 (Kennedy, Justice, concurring).

However, "[t]he predicate for money damages against an unconsenting state in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the

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determine whether and under what circumstances Congress can so act, we conclude that the regulation exceeds the rulemaking authority of the Department of Justice.

State in its official capacity. That predicate . . . has not been established." *Id.* at 376.

We reverse the order granting summary judgment for plaintiffs on all counts, and remand with directions to grant the DOT's cross motion for summary judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 96-17716 CA (23)

CLASS ACTION

SERGIO RENDON, JOANN M. NORRIS and JAMES J. SILCOCK, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, an Agency of the State of Florida; FRED O. DICKINSON, III, in his official capacity as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; FLORIDA DEPARTMENT OF TRANSPORTATION, an Agency of the State of Florida; and BEN G. WATTS, in his official capacity as Secretary of the Florida Department of Transportation,

Defendants.

_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND DENYING DEFENDANTS' MOTION TO DISMISS

This cause came before the Court on February 6, 1998, for a hearing on Plaintiffs' motion for class certification, Plaintiffs' motion to allow joinder of additional named plaintiffs, and Defendants' motion to dismiss. Appearing as counsel for Plaintiffs were Karen A. Gievers, Marc Cooper, Michael F. Lanham, Stephen R. Senn, J. Davis Conner, Robert G. Fegers, and Raymond Thompson. Appearing for Defendants were Eric Taylor and Joseph Mancilla.

Plaintiffs to this cause contend that the imposition of a surcharge for placards allowing use of accessible parking, as provided in Florida Statutes § 320.0848, constitutes an unlawful fee against access. Plaintiffs seek injunctive and declaratory relief prohibiting the imposition and collection of the placard fee and requiring the Defendants to refund the surcharge to all individuals or organizations which have paid this surcharge from the date of its inception to the present.

Plaintiffs seek to represent a class of individuals or groups who have purchased or who will in the future purchase a disabled parking permit as provided by Florida Statute § 320.0848. In order to maintain an action as a class action, the case must meet the requirements of Rule 1.220(a) and the requirements of either Rule 1.220(b)(1), (b)(2) or (b)(3). Plaintiffs seek to bring this action as a class action under either Fla. R. Civ. P. 1220(b)(1), (b)(2) or (b)(3).

Upon due consideration, the Court finds as follows with respect to the various elements of class certification under Rule 1.220(a):

Numerosity. Although the exact number of class members is unknown at this time, between the inception of the disabled parking permit program in January 1991 and July 1994, the State of Florida issued over 900,000 permits. Separate joinder of hundreds of thousands of class members is obviously impractical. See *Broin v. Philip Morris Companies,* 641 So.2d 888, 889 (Fla. 3d DCA 1994) (60,000 proposed class members); *Maner Properties, Inc. v. Siksay,* 489 So.2d 842 (Fla. 4th DCA 1986) (over 350 potential class members). The class of persons who purchased disabled parking permits is distinct and described with certainty. See *Harrell v. Hess Oil & Chem. Corp.*, 287 So.2d 291, 294 (Fla. 1973); *Estate of Bobinger v. Deltona Corp.*, 563 So.2d 739, 742 (Fla. 2d DCA 1990). Moreover, a class action is particularly appropriate here because the amount of each claim is so small (approximately $15 per permit) that it would not be economically feasible for individual members of the class to independently prosecute an action. Without the benefits of a class suit the vast majority of class members would be deprived of a remedy for the alleged violations of their rights under the ADA. See *Broin*, 641 So.2d at 891-92.

Commonality. This criterion requires only that resolution of the common questions affect all or a substantial number of the class members. The threshold is not high. *Broin*, 641 So.2d at 890. Here, the claims of the proposed class members are virtually identical. The members of the putative class all purchased disabled parking permits and were required by the Defendants to pay the charges imposed under Fla. Stat. § 320.0848. Whether this fee is

lawful is the principle issue in this case and is common to all members of the putative class. They all seek the same recovery and share a common interest in obtaining the relief sought. For these reasons, the claims are sufficiently common for purposes of class certification. *Id.*

Typicality. The named plaintiffs' claims are virtually identical to the claims of the other class members. The named plaintiffs bring this action on behalf of all persons who were charged the excessive tax amount for their disabled parking permit under Florida Statute § 320.0848. Each of the named plaintiffs purchased a disabled parking permit in the State of Florida through the Florida Highway Safety and Motor Vehicle Department. Each of the named plaintiffs were compelled to pay for a disabled parking permit in the State of Florida through the Florida Highway Safety and Motor Vehicle Department in order to use accessible parking spaces within the State of Florida (both for public and private parking lots or areas). Each named plaintiff and each member of the class has an interest in enjoining collection of the placard fee and in obtaining reimbursement of the allegedly unlawful fee. Their claims have not been shown to be antagonistic in any way. The court finds that the typicality requirement has been met. See *Broin*, 641 So.2d at 892; *Estate of Bobinger*, 563 So.2d at 745.

Adequate representation. This criterion is met if the named plaintiffs and class members have common interests and the class representatives and their qualified attorneys will properly prosecute the class action. *Broin*, 641 So.2d at 892. For the reasons discussed above, the named plaintiffs and all other class members share common interests. There is no suggestion of antagonistic interests among the members of the class. Because the

named representative plaintiffs seek the same relief for themselves as they seek for all class members, they are not likely to neglect their obligations to the class. *Broin*, 641 So.2d at 892. Finally, the Court finds that the team of plaintiffs' attorneys have the legal resources, knowledge, and experience adequate to protect all members of the class. See *Estate of Bobinger*, 563 So.2d at 746.

Based upon the foregoing, the Court is persuaded that the elements of Rule 1.220(a) have been satisfied.

The Court must next determine whether one of the prongs of Rule 1.220(b) are met. The record here shows that Defendants have acted on grounds generally applicable to all members of the class in imposing the challenged charges for disabled parking permits under Florida Statutes § 320.0848, thereby making final injunctive and declaratory relief as to the validity of the charges imposed under that statute appropriate with respect to the class as a whole. Certification under Rule 1.220(b)(2) is therefore appropriate, since the essence of the claim here is discrimination and the request for refund of the disabled parking permit charges is incidental to the primary issue of whether the class is entitled to declaratory and injunctive relief with respect to the validity of Florida's disabled parking permit program. See *Bing v. Broadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) (civil rights class action seeking back pay as well as injunctive relief properly brought under subdivision (b)(2)); *Gammon v. GC Services Ltd. Partnership*, 162 F.R.D. 313 (N.D. Ill. 1995) (class certification under subdivision (b)(2) proper in action seeking declaratory judgment under Fair Debt Collection Practices Act in light of small amount of statutory damages that each class member would potentially receive); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D.

439 (N.D. Cal. 1994) (certification under Fed. R. Civ. P. 23(b)(2) of class of disabled persons alleging denial of equal access to movie theaters in violation of ADA proper, despite claim for money damages in addition to injunctive relief).

The Defendants do not vigorously oppose the Plaintiffs' arguments that the elements for class certification are met. Rather, Defendants' principle argument is that the action should be dismissed due to Plaintiffs' failure to exhaust certain administrative remedies, which are a legislative condition precedent to filing suit. The principle cases cited by Defendants in support of their motion are *Miami Tiresoles, Inc. v. Department of Revenue*, 695 So.2d 851 (Fla. 3d DCA 1997); *Department of Revenue v. Bauta*, 691 So.2d 1173 (Fla. 3d DCA 1997); and *Westring v. Department of Revenue*, 682 So.2d 171 (Fla. 3d DCA 1996). Plaintiffs contend that they were not obligated to pursue administrative remedies as a condition precedent to bringing this action for two reasons. First, any rule of state law which would require the exhaustion of administrative remedies is preempted as a matter of federal law under Title II of the ADA through the Supremacy Clause. Plaintiffs persuasively contend that the terms of the ADA, see 42 U.S.C. §§ 12201(b), 12202; the ADA's regulations and agency interpretations, see 28 C.F.R. § 35.172(b); and case law, see *Roe v. County Comm'n of Monongalia County*, 926 F.Supp. 74, 77 (N.D. W.Va. 1996); *Smith v. State of Indiana*, 904 F.Supp. 877 (N.D. Ind. 1995); *Piquard v. City of East Peoria*, 887 F.Supp. 1106 (C.D. Ill. 1995); all demonstrate that a Title II plaintiff has a federal right to proceed directly to court and is not required to first comply with administrative exhaustion requirements of state law. Secondly, Plaintiffs contend that Defendants are estopped

from requiring the exhaustion of administrative remedies because Defendants obtained dismissal of two prior federal suits challenging the placard fee by representing to the federal courts hearing those cases that an adequate remedy for their claims would be available in state court. Upon due consideration, the Court finds that under the particular circumstances of this case, the Plaintiffs were not required to exhaust state administrative remedies before bringing this suit.

Based on the foregoing, it is

ORDERED:

1. Plaintiffs' motion for class certification is GRANTED, and a plaintiff class is certified defined as:

> All persons or organization who have purchased permits for persons with nontemporary disabilities allowing use of accessible parking, since January 26, 1992, and all persons with nontemporary disabilities who will in the future be required to pay money for such permits until and unless declaratory and injunctive relief restrains the future collection of such fees.

2. Defendants' motion to dismiss is DENIED.

3. Plaintiffs' motion to allow joinder of additional named plaintiffs is GRANTED, and Paul J. Lussier, Stephen R. Fisher, and Lois V. Busick are added as additional representative plaintiffs of the class certified by this order.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida, this 16 day of April, 1998.

AMY STEELE DONNER
CIRCUIT JUDGE
AMY DONNER
Circuit Court Judge

copies to:

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Eric J. Taylor, Esq.
Jim Floyd, Esq.
J. Davis Connor, Esq.
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Raymond E. Thompson, Esq.
Michael F. Lanham, Esq.
Karen A. Gievers, Esq.
Marc Cooper, Esq.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 96-17716 CA 23

CLASS ACTION

SERGIO RENDON, JOANN M. NORRIS, JAMES J. SILCOCK, PAUL J. LUSSIER, STEPHEN R. FISHER, and LOIS V. BUSICK, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, an Agency of the State of Florida; FRED O. DICKINSON, III, in his official capacity as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; FLORIDA DEPARTMENT OF TRANSPORTATION, an Agency of the State of Florida; and BEN G. WATTS, in his official capacity as Secretary of the Florida Department of Transportation,

Defendants.

_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on October 23, 2001, on Plaintiffs' and Defendants' Motions for Summary Judgment. Having been advised in the premises the Court finds:

1. Florida Statute §320.0848 requires the payment of a fee for a disabled parking permit by individuals who have a long-term mobility impairment.

2. Individuals who are eligible to purchase a disabled parking permit are encompassed by the definition of "disability" contained in the ADA. 42 U.S.C. §12102(2).

3. The fee for such a parking permit is fifteen dollars for each initial four-year or renewal permit, of which the State Transportation Trust Fund receives $13.50 and the tax collector of the county in which the fee is collected receives $1.50. One dollar is charged for each additional or additional renewal four-year permits, of which the entire sum is received by the State Transportation Trust Fund. *See* Fla. Stat. §320.0848(2)(c)(1)(a) and (b).

4. The ultimate use of the funds raised by the statute are intended to raise revenue for general public purposes and are not designed to cover the costs incident to regulation or administration. *See Luisser v. State of Florida, Department of Highway Safety and Motor Vehicles*, 972 F. Supp. 1412, 1420, 1421 (M.D. Fla. 1997).

5. The instant litigation challenges this fee and contends that the fee requirement violates Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§12131-12165.

6. The permit fee was originally challenged in two separate actions in federal court. Both actions were dismissed upon the findings that the permit fee is a tax and that a plain, speedy, and efficient remedy for Title II violations is available in state court. *Lussier v. Florida*, 972 F. Supp. 1412 (M.D. Fla. 1997); *Rendon v. Florida*, 930 F. Supp. 681 (S.D. Fla. 1996).

7. On September 3, 1996, the instant action was filed.

8. At a hearing on February 27, 1997, Defendants' Motion to Dismiss, which claimed that Plaintiffs had failed to timely pursue administrative remedies under Fla. Stat. §215.26, was denied.

9. On April 16, 1998, the Court granted Plaintiffs' Motion for Class Certification and to add additional named Plaintiffs, and denied Defendant's Second Motion to Dismiss, which was again premised on Fla. Stat. §215.26.

10. On May 7, 1998, Defendants' Motion for Rehearing was denied. Defendant's appeal of this ruling was eventually dismissed as untimely.

11. On May 7, 1999, Defendants moved for dismissal based, once again, on Plaintiffs' failure to pursue administrative remedies under Fla. Stat. §215.26. On September 23, 1999, this Court denied Defendant's Motion to Dismiss.

12. On December 28, 1998, Plaintiffs' moved for summary judgment. Plaintiffs' Motion asks the Court to rule that the permit fee is unlawful, enjoin further collection of the fee, direct reimbursement of all permit fees collected since January 26, 1992 (the effective date of Title II), and the payment of attorney's fees and costs in an amount to be determined by subsequent order.

13. A hearing on Plaintiffs' Motion for Summary Judgment had been stayed several times. Additionally, on February 15, 2000, a stay of proceedings was entered in anticipation of rulings from the United States Supreme Court.

14. On October 9, 2001, Defendants moved for summary judgment.

15. On October 23, 2001, a hearing was held on the parties' respective Motions for Summary Judgment.

16. Each separate Title provision of the ADA must be analyzed separately when a court considers whether a statute violates a particular provision. *See Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, 960 n1 (2000).

17. Regarding public entities, Title II provides in part that:

> [N]o qualified individual with a disability, shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

18. After outlining the main principles for the eradication of barriers to access, Congress directed the Attorney General to promulgate particularized regulations in order to implement the ADA's goals. 42 U.S.C. §12134.

19. One such regulation prohibits the charging of a fee by a public entity as a condition for the enjoyment of any rights provided under the ADA:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act of this part.

28 C.F.R. §35.130(f). In other words, it is impermissible for a public entity to charge a fee in order that a disabled individual enjoy any measure of accommodation that is required by the ADA.

20. Payment by disabled individuals of the parking permit fee required under Fla. Stat. §320.0848 is necessary in order for such individuals to enjoy an accommodation that is mandated by the ADA. As such, the fee is imposed on some disabled individuals as a condition of removal of a barrier to equal accessibility.

21. The provision of handicapped license plates, standing alone, is insufficient to provide all disabled individuals nondiscriminatory access to public places. Not every disabled person owns a car, and some disabled individuals rely on other drivers for their transportation needs. In sum, there are times when such license plates are not as effective in guaranteeing access as parking permits, and there exist groups of disabled persons for whom such license plates are not a viable alternative to the purchase of a removable parking permit.

22. Regulations passed pursuant to the ADA bind states so long as the regulations are not arbitrary, capricious, or manifestly contrary to the ADA. *See Dare v. California*, 191 F. 3d 1167 (9th Cir. 1999), cert. den., 121 S. Ct. 1187

(2001); *Duprey v. Connecticut*, 28 F. Supp. 2d 702 (M.D. Conn. 1998).

23. Plaintiffs do not have to exhaust the state administrative remedies provided for in Fla. Stat. §215.26 in order that the Court hear this case.

24. The Court has repeatedly rejected Defendants' Fla. Stat. §215.26 argument, as evinced by the denial of three Motions to Dismiss which made the §215.26 argument and the denial for a reconsideration of the Order denying the Second Motion to Dismiss.

25. The federal ADA preempts any state law requirement to exhaust administrative remedies.

26. 42 U.S.C. §12201(b) preempts state laws which provide less protections that the ADA including a party's ability to take a Title II claim directly to court:

> Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any state or political subdivision of any State that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

See 42 U.S.C. §12201(b).

27. For purposes of ADA actions, a State is entitled to no further protections than those afforded to non-state entities, and as such may not interpose an administrative remedy between an aggrieved party and access to a judicial forum:

> In any action against a State for a violation of the requirement of this chapter, remedies

> (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

See 42 U.S.C. §12202.

28. Defendants have previously argued that state court is the best forum for the airing of Plaintiffs' claims. *See Luisser, supra*, at 1415:

> The gist of the Defendants' position is that the provision of any or all of the relief requested by the Plaintiffs would necessarily involve enjoining, restraining or suspending the collection of a state tax, and that the state courts are structurally capable of providing the Plaintiffs with a full and fair hearing on their ADA claim.

29. Even if the administrative remedy of Fla. Stat. §215.26 is applicable to the instant case, it is permissible for Plaintiffs to file suit directly in court without filing an administrative claim pursuant to §215.26 because Plaintiffs' sole claim for a refund is that the parking permit fee is unconstitutional. *See Department of Revenue v. Nemeth*, 733 So. 2d 970, 974 (Fla. 1999), cert. den., 528 U.S. 871 (1999).

30. Even if the *Nemeth* exception to the pursuit of an administrative remedy is only applicable to facial challenges to the constitutionality of statute, the exception applies to the instant case because Plaintiffs assert a facial challenge to the constitutionality of the parking permit fee statute in arguing that every class member is protected by Title II.

31. Defendants have not pled any time-limitation defense and in doing so have waived their right to raise the issue. *See* Fla. R. Civ. P. 1.140(h).

32. Even if time limitations were a legitimate issue, the pendency of the earlier federal class action suits tolled the statute of limitations. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

33. Defendants' claim that permit fees are authorized under Public Law 100-641 (1988) and Uniform System for Parking for Persons with Disabilities, 23 C.F.R. § Part 1235 (USPPD) is unpersuasive.

34. Public Law 100-641, which directs the Secretary of Transportation to issue regulations which establish a uniform system for handicapped parking in order to enhance the safety of such individuals, is not codified, has no enforcement mechanism, and is merely advisory as opposed to mandatory.

35. Neither Public Law 100-641 nor the USSPD authorize fees on parking permits.

36. Even if either of these pre-ADA promulgated suggestions authorize fees on parking permits, the ADA's prohibition against a public entity charging fees for access (28 C.F.R. §35.130(f)) overrides any prior contrary rule. *See McGarry v. Missouri*, 7 F. Supp. 1022 (W.D. Mo. 1998).

37. Even if either of these pre-ADA promulgated suggestions authorize fees on parking permits, the ADA preserves only prior laws which are as or more protective than the provisions of the Act. 42 U.S.C. §12201(b).

38. Sovereign Immunity has been waived under Title II of the ADA because Congress expressed an unequivocal

intent to abrogate immunity and acted pursuant to its powers under §5 of the Fourteenth Amendment. *See Dare, supra*, at 1174.

39. Congress' enforcement authority is at its highest when designing remedies aimed at the Fourteenth Amendment guarantee of equal protection. *See Dare, supra*, at 1174.

40. When Congress enacted the ADA, it made specific factual findings of arbitrary and invidious discrimination against the disabled. *See Dare, supra*, at 1174.

41. The ADA was a congruent and proportional exercise of Congress' enforcement power under §5 of the Fourteenth Amendment that validly abrogated the States' Eleventh Amendment immunity. *See Dare, supra*, at 1175.

42. Even if Sovereign Immunity is applicable to the instant issue, Sovereign Immunity does not prevent a court from granting declaratory and injunctive relief. *See Alden v. Maine*, 119 S. Ct. 2240, 2263, 2267 (1999).

43. 42 U.S.C. §12205 provides in part that: "In any action . . . commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs . . . "

44. The Eleventh Amendment does not protect the State from liability for attorney's fees arising under the instant case. *See Hutto v. Finney*, 437 U.S. 678 (1978).

45. The Eleventh Amendment does not protect the State from liability for prejudgment interest accruing under the instant case. *See Flack v. Graham*, 461 So. 2d 82 (Fla. 1984).

46. The pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law. *See* Fla. R. Civ. P. 1.510(c).

THEREFORE, it is

ORDERED AND ADJUDGED:

1. Plaintiffs' Motion for Summary Judgment is GRANTED.

2. The Court hereby DECLARES that the State of Florida's statutory scheme of requiring the payment of a fee for a disabled parking permit under Fla. Stat. §320.0848 violates Title II of the Americans with Disabilities Act.

3. Defendants are hereby ENJOINED from requiring the payment of any fee for a disabled parking permit from future permit applicants.

4. Defendants shall reimburse Plaintiffs for parking permit fees collected since January 26, 1992, plus interest.

5. Defendants shall pay Plaintiffs' attorney fees in an amount to be determined in a subsequent order.

6. This Court shall reserve jurisdiction to resolve any unremaining issues, including but not limited to form of notice, manner of reimbursement, and disposition of any unclaimed funds.

DONE AND ORDERED in Chambers in Miami-Dade County, Florida, on this 14 Day of November, 2001.

/s/ Amy Steele Donner
AMY STEELE DONNER
CIRCUIT COURT JUDGE

Copies furnished to all counsel of record
(See Attached List)

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IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2002

DECEMBER 11, 2002

STATE OF FLA., DEPT OF HGHWY SAF., ETC., ET AL.,
Appellant(s)/Petitioner(s),

vs.

SERGIO RENDON, ET AL.,
Appellee(s)/Respondent(s).

CASE NO.: 3D02-611

LOWER TRIBUNAL NO. 96-17716

Upon consideration, appellees' motion for clarification, reconsideration, or certification and motion to stay mandate are hereby denied. JORGENSON, LEVY and GODERICH, JJ., concur.

A True Copy

ATTEST

/s/ [Illegible]
Clerk District Court of
Appeals [Illegible]

[SEAL]

cc:
Robert G. Fegers
Eric J. Taylor
Michael F. Lanham
Stephen R. Senn
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Karen A. Gievers
Steven Ferst

Supreme Court of Florida

TUESDAY, JULY 15, 2003

CASE NO.: SC03-42
Lower Tribunal No.: 3D02-611

SERGIO RENDON, ET AL.	vs.	FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, ET AL.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdicitonal briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE, CANTERO and BELL, JJ., concur.

A True Copy

Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk Supreme Court

[SEAL]

bh
Served:
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TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

42 U.S.C. § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Federal Regulation

28 C.F.R. § 35.130(f) provides:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this Part.

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 03-559

In The

Supreme Court of the United States

October Term, 2003

SERGIO RENDON, et al.,

Petitioners,

v.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al.,

Respondents.

On Petition For A Writ of Certiorari To The Third District Court of Appeal, State of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The respondents submit that the first question should be stated as the issue is not whether Congress has authority to abrogate the States' sovereign immunity under Title II of the American with Disabilities Act, but whether it properly did so pursuant to its authority under section 5 of the Fourteenth Amendment. As argued, infra, the second question is moot.

1. Whether Congress properly abrogated the sovereign immunity of the States for claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 et seq.

2. Whether the Tenth Amendment to the United States Constitution prohibits the prospective enforcement of Title II of the Americans with Disabilities Act by entry of declaratory and injunctive relief against the responsible state officers in accord with Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908).

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STATEMENT OF THE CASE

Petitioners/Plaintiffs ("petitioners") filed this class action suit against the State of Florida, Department of Highway Safety and Motor Vehicles, and its executive director in his official capacity, and the State of Florida, Department of Transportation, and its secretary in his official capacity. Petitioners sought declaratory and injunctive relief and a refund of money paid pursuant to § 320.0848(2)(c), Fla. Stat. Prior to its amendment in 2002, § 320.0848(2)(c) provided for a small tax on parking placards issued to persons with certain qualifying disabilities. The parking placard allows the holder to park a vehicle in spaces reserved for persons with disabilities.

Petitioners have contended that the tax violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and 28 C.F.R. § 35.130(f), a Department of Justice regulation implementing Title II. Nothing in Title II of the ADA has ever required the States to implement parking placard programs for the disabled. Nor does 28 C.F.R. § 35.130(f) impose such a requirement. The regulation provides:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(Emphasis added). Notwithstanding the fact that placard programs are not required by the ADA or the Equal Protection Clause of the Fourteenth Amendment, petitioners contend that a State violates the ADA by imposing even a nominal charge to administer such a program.

The impetus for placard programs arose among the States well before enactment of the ADA. As early as 1979, and on its own initiative, Florida began to require accessible parking for persons with impaired mobility. At that time Florida charged a fee of $.50 for small metal tags that could be affixed to license plates. See chap. 79-82, § 7, Laws of Florida (1979). In the 1980s the federal government sought to encourage a uniform, voluntary system that would enable the States to honor each others' tags. Pursuant to Public Law 100-641, the U. S. Department of Transportation adopted regulations in 1991 to serve as guidelines for a uniform system. See 23 C.F.R. Part 1235, Uniform System for Handicapped Parking (56 Fed. Reg. 10328). These regulations, adopted after passage of the ADA, left it to the states to decide whether and how much to charge for windshield placards. See 56 Fed. Reg. at 10344.

Although Department of Justice regulations adopted in 1991 state that public entities should create designated accessible parking spaces (which Florida had long been doing), even these regulations say nothing about a placard program. See 28 C.F.R. § 36.304(b)(18).

The trial court ruled that the imposition of the tax on the parking placards violated 28 C.F.R. § 35.130(f) and Title II of the ADA. Pet. App. 27, 29. The court enjoined collection of the tax and ordered the State to reimburse the plaintiff class for placard fees collected since January 26, 1992, including prejudgment and post-judgment interest. Pet. App. 29.

In 2002, after this case was appealed, the placard tax was eliminated. See chapter 2002-20, § 121, Laws of Florida. The statute, as amended, imposes an administrative fee of $1.50 payable to the county tax collector. See § 320.0848(2)(c), Fla. Stat. (2002). Prior to the amendment, the county tax collector was entitled to retain $1.50 from the amount assessed. No county tax collector was ever a party to this action, and the $1.50 administrative fee is not at issue.

The Third District Court of Appeal reversed the trial court, holding that Congress did not properly abrogate the States' sovereign immunity pursuant to its power under section 5 of the Fourteenth Amendment. The Third District also held that the Department of Justice exceeded its authority in enacting 28 C.F.R. § 35.130(f), because that regulation, and the requirements it imposed on the states, were beyond the scope of the Fourteenth Amendment. Accordingly, petitioners were not entitled to prospective injunctive relief. Pet. App. 9.

The Third District Court of Appeal denied the petitioners' motion for clarification and reconsideration, and the Florida Supreme Court denied review of the decision of the Third District. Pet. App. 31, 32.

REASONS FOR DENYING THE PETITION

Following the decision in University of Alabama v. Garrett, 531 U.S. 356 (2001), this Court has denied review in three cases in which courts of appeals rejected challenges to fees imposed in state-administered placard programs. Two of those cases found the Department of Justice regulation at issue here invalid under the Fourteenth Amendment. Although because of the pendency of Tennessee v. Lane, 325 F.3d 680 (6th Cir.), cert. granted, 123 S.Ct. 2622 (2003), the Court could hold the instant petition until that case is decided, denial of review would clearly be consistent with its previous action. Tennessee v. Lane does not concern the Department of Justice regulation here in question. Moreover, the circuit conflict on which petitioners rely is less than compelling.

In any case, only the first of the questions presented could possibly merit review. The second is moot by virtue of the repeal of the placard tax.

I. THE PERCEIVED CONFLICT AMONG THE CIRCUITS DOES NOT WARRANT REVIEW OF THE DECISION BELOW.

The decision below, ruling that Title II does not properly abrogate the sovereign immunity of the States pursuant to section 5 of the Fourteenth Amendment, is consistent with the holdings of at least seven circuits. The petitioners herein have never asserted that the placard tax violates a right to due process or that Title II of the ADA properly abrogated the sovereign immunity of the States under the Due Process Clause of the Fourteenth Amendment. Nor have they raised any claim of discriminatory animus. Thus, the conflict which they assert merits this Court's review is between the Ninth Circuit on one hand, and the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits on the other. The Ninth Circuit has simply refused to apply this Court's Title I decision in University of Alabama v. Garrett, 531 U.S. 356 (2001), to Title II cases, relying on a pre-Garrett Title II decision.[1] The other seven circuits have all concluded that Title II of the ADA does not properly abrogate the States' sovereign immunity for the equal protection claim asserted here.[2]

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[1]See Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002), relying on Dare v. California, 191 F. 3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001).

[2]See Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002); Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1979) (en banc), cert. dismissed, 529 U.S. 1001 (2000); Thompson v. Colorado, 258 F.2d 1241, amended 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002). The Second Circuit would allow a damages claim under Title II only on proof of discriminatory animus. See Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001), while the Sixth Circuit has held that Title II of the ADA cannot be sustained as an act that enforces the Equal Protection

Moreover, following Garrett, this Court has thrice denied review of decisions rejecting challenges under Title II to state-imposed placard fees. See Thompson v. Colorado, 278 F.3d 1020, 1027-34 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); and Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U. S. 1190 (2001); Neinast v. Texas, 217 F.3d 275 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001).

The "conflict," therefore, is between seven circuits that have applied Garrett to Title II and one that has refused to do so. The respondents submit that this conflict is not one that merits review of the Third District's decision and that, consistent with its action in Thompson, Brown and Neinast, the Court should deny the writ.

II. THE SECOND QUESTION PRESENTED IS MOOT.

The fact that the Third District decided that no prospective injunctive relief was available does not present a question meriting the Court's review. The tax on parking placards was repealed before the Third District rendered its decision. There would be no point in enjoining the respondents from collecting a tax that no longer exists. Because petitioners' claimed right not to be taxed is no longer at issue, the question of prospective injunctive relief is moot. See Diffenderfer v. Central Baptist Church, 404 U. S. 412, 414-15 (1972); United States Department of Justice v. Provenzano, 469 U.S. 14 (1984). See also Green v. Mansour, 474 U.S. 64, 71-73 (1985) (because there was no

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Clause, but may be read to enforce the Due Process Clause. See Popovich v. Cuyahaga County Court, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).

continuing violation of federal law, an injunction against state officials was unavailable).

Further, petitioners' argument does not accurately represent the holding of the Third District. On the question of prospective injunctive relief, the court adopted the "holding and rationale" of the Fourth Circuit's decision in Brown and ruled that 28 C.F.R. § 35.130(f), was beyond the remedial scope of section 5 of the Fourteenth Amendment. Thus, the court held that "because the regulation is invalid, prospective relief does not lie." Pet. App. at 9. Petitioners' brief to the Third District did not attempt to argue that the regulation could be justified on the basis of any Article I power of Congress. Hence, the court's footnote comment concerning cases decided under the Tenth Amendment and the lack of a clearly expressed Congressional intent to strip states of their traditional authority to charge fees for services is merely dicta. See Pet. App. at 9, n.5.

Accordingly, petitioners' statement that the decision below "is contrary to every Circuit decision on this point" is incorrect and presents no additional ground for review.

CONCLUSION

For the reasons stated, it would be appropriate for the Court to deny a writ of certiorari. Alternatively, in the absence of any demonstrated need to decide both this appeal and Tennessee v. Lane, the Court could withhold action until disposition of that case.

RESPECTFULLY SUBMITTED,

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